

Words+ and Compusult's argument that this factor will necessarily provide a competitive advantage to a new entrant.<sup>352</sup> All companies that do not qualify for the small business exemption, whether new entrants or incumbents, must engage in an achievability analysis. All companies are required to provide accessibility unless it cannot be done "with reasonable effort or expense."<sup>353</sup> Given the multitude of factors that affect a company's prospects in the marketplace, we do not see much of a competitive advantage arising from the ability of a new entrant to assert this third factor as a defense to a complaint.

138. The degree to which this factor affects a finding of achievability will depend upon a number of considerations. We agree with CEA that the Commission should give little weight to whether a new entrant has experience in other unrelated markets.<sup>354</sup> In this regard, we consider the various telecommunications and information technology markets to be related. We agree with T-Mobile that because each service provider has different technical, financial, and personnel resources, with different business models and distinct technology configurations and platforms, this factor requires that we look at each company individually when we consider the impact on the operation of the covered entity of providing the accessibility feature.<sup>355</sup>

139. In addition, as suggested by the IT and Telecom RERCs and ACB, when applying this factor, we will take into consideration the size of the company.<sup>356</sup> We agree that a small start-up company, which may need time to develop its financial resources and learn the field and its requirements, should be treated differently than a larger company with the resources available to more rapidly achieve accessibility features.<sup>357</sup> While we reject TIA's suggestion that the size of the company should not matter when applying this factor,<sup>358</sup> we agree with TIA that a company's size alone is not a proxy for determining whether accessibility can be achieved.<sup>359</sup> Consistent with the legislative history, we find that the existence of substantial financial resources does not, by itself, trigger a finding of achievability.<sup>360</sup>

**(iv) Extent to which Accessible Services or Equipment  
are Offered with Varying Functionality, Features,  
and Prices**

140. *Background.* The fourth factor in determining whether compliance with Section 716 is "achievable" requires the Commission to consider "[t]he extent to which the service

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ensure that nascent and groundbreaking products and services are not unnecessarily hindered); TIA Comments at 16.

<sup>352</sup> Words+ and Compusult Comments at 24.

<sup>353</sup> 47 U.S.C. § 617(g).

<sup>354</sup> See CEA Comments at 49.

<sup>355</sup> T-Mobile Comments at 10.

<sup>356</sup> See IT and Telecom RERCs Comments at 23; ACB Reply Comments at 26. As explained in the prior subsection, we will consider the total gross revenues of the entire enterprise and not limit our consideration to the gross revenues of the particular subsidiary providing the product or service.

<sup>357</sup> See IT and Telecom RERCs Comments at 23.

<sup>358</sup> TIA Comments at 16-17.

<sup>359</sup> See TIA Comments at 16-17.

<sup>360</sup> See House Report at 25.

provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.”<sup>361</sup> The Senate and House Reports state that “the Commission [should] interpret this factor in a similar manner to the way that it has implemented its hearing aid compatibility rules.”<sup>362</sup> The Commission’s rules governing hearing aid compatibility (“HAC”) obligations for wireless devices require manufacturers and service providers to ensure that a range of phones complies with the HAC standards. Specifically, those rules direct such companies to ensure that hearing aid users are able to select “from a variety of compliant handset models with varying features and prices.”<sup>363</sup> Companies are not, however, required to make all wireless handsets hearing-aid compatible.

141. In the *Accessibility NPRM*, the Commission sought comment on whether covered entities generally should not have to consider what is achievable with respect to every product, if the entity offers consumers with the full range of disabilities meaningful choices through a range of accessible products with varying degrees of functionality and features, at differing price points.<sup>364</sup> At the same time, the Commission also sought comment on whether there are some accessibility features that are so important or easy to include (like a “nib” on the 5 key)<sup>365</sup> that they should be deployed on every product, unless it is not achievable to do so.<sup>366</sup> Finally, the Commission sought comment on whether it should define with more specificity the meaning of “varying degrees of functionality and features” and “differing price points.”<sup>367</sup>

142. *Discussion.* To satisfy the fourth achievability standard, a covered entity is required by the CVAA to offer people with each type of disability<sup>368</sup> accessibility features within a line of products that includes the full range of functionality within the product line as well as a full range of prices within the product line, if achievable.<sup>369</sup> We interpret the plain language of

<sup>361</sup> 47 U.S.C. § 617(g)(4). See also Senate Report at 8; House Report at 26; *Accessibility NPRM*, 26 FCC Rcd at 3160, ¶ 74.

<sup>362</sup> House Report at 26; Senate Report at 8.

<sup>363</sup> *Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets*, Petition of American National Standards Institute Accredited Standards Committee C63, WT Docket No. 07-250, First Report and Order, 23 FCC Rcd 3406, 3426 ¶ 51 (2008). The rules also require that manufacturers meet a “product refresh” mandate that requires the inclusion of hearing aid compatibility in some of their new models each year. *Id.* at 3425, ¶ 48. The Commission explained that this rule, together with the requirement for service providers to offer handset models with different functionality levels, was designed to ensure that consumers would have access to HAC handsets “with the newest features, as well as more economical models.” *Id.* at 3424, ¶ 47.

<sup>364</sup> *Accessibility NPRM*, 26 FCC Rcd at 3161, ¶ 76.

<sup>365</sup> To help individuals who are visually impaired locate the keys on a standard number pad arrangement, the 5-key dial pad has a raised nib or projecting point that provides a tactilely discernible home key.

<sup>366</sup> *Accessibility NPRM*, 26 FCC Rcd at 3161-3162, ¶ 76.

<sup>367</sup> In particular, the Commission sought comment on ACB’s assertion that “[i]t is essential that manufacturers and service providers make available a range of devices that fit various price ranges along with corresponding accessible features . . . this may be accomplished by dividing devices into classes and making certain that each class has at least one option that is fully accessible.” ACB Reply Comments to *October Public Notice* at 13. See *Accessibility NPRM*, 26 FCC Rcd at 3162, ¶ 76.

<sup>368</sup> This includes people with multiple disabilities.

<sup>369</sup> See ACB Reply Comments at 30-33; AFB Reply Comments at 11; Consumer Groups Reply Comments at 2-4.

the statute and legislative history to mean that covered entities generally need not consider what is achievable with respect to every product, if the entity offers consumers with the full range of disabilities meaningful choices through a range of accessible products with varying degrees of functionality and features, at differing price points.<sup>370</sup>

143. Furthermore, to satisfy this factor, offering the full range of accessible products with varying degrees of functionality and features at different price points must be done effectively. We acknowledge the concern expressed by the IT and Telecom RERCs in their comments that company-chosen sets of devices to be made accessible may not provide good representation of the range of products offered by the company, and as a result, accessible versions may not always appear in stores, may not always be available as part of bundles, may be more expensive and difficult to obtain than the comparable non-accessible products, may not always represent the full range of features and prices available to everyone else, may not always be supported by employers and their information technology departments, and may not always be available in certain parts of the country.<sup>371</sup>

144. Because Section 716(g)(4) specifically calls for “varying degrees of functionality and features, and offered at differing price points,”<sup>372</sup> we emphasize that accessibility features must be made available within a line of products that includes the full range of functionality and prices for that line of products.<sup>373</sup> In other words, if a line of products includes low-end products, it is just as important that low-end products and services be accessible as high-end products and services if achievable.<sup>374</sup>

145. We decline to mandate ACB’s proposal that, for the purpose of making available a range of devices that fit various price ranges along with corresponding accessible features, the devices may be divided into classes, making certain that each class has at least one option that is fully accessible.<sup>375</sup> We agree with CEA that mandating such a proposal would be unworkable for some manufacturers and service providers, given that technology and consumer preferences are

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<sup>370</sup> See 47 U.S.C. § 617(g)(4). Although a range of accessible products with varying degrees of functionality and features, at differing price points must be offered across a product line for people with the full range of disabilities if achievable, in the context of a complaint proceeding, only the facts of the complaint will be considered. In other words, a complaint proceeding will not consider the accessibility of a product for types of disabilities that are not the subject of the complaint.

<sup>371</sup> See IT and Telecom RERCs Comments at 24. See also AFB Reply Comments at 12 (if a full range of accessible products is not available, and only top-of-the-line products are accessible, a company should offer at least one accessible alternative at no additional cost beyond the cost for the level of product desired by the customer with a disability).

<sup>372</sup> 47 U.S.C. § 617(g)(4).

<sup>373</sup> We therefore reject ITI’s assertion that Section 716(g)(4) along with Section 716(j) are to be read to mean the covered entities are compliant “so long as some reasonable subset of features and services are accessible.” ITI Comments at 10. We are concerned that ITI’s reading of the CVAA would result in lack of accessibility over the full range of functionality and prices.

<sup>374</sup> We therefore reject CEA’s assertion that mandating a fully accessible low-end device is outside the scope of the CVAA and is not economically viable. See CEA Comments at 26.

<sup>375</sup> See ACB Comments to *October Public Notice* at 13; ACB Reply Comments at 30-31. See also IT and Telecom RERCs Comments at 23-24.

constantly evolving.<sup>376</sup>

146. We also share the concern expressed by Words+ and Compusult that the fourth achievability factor not be interpreted in a way that would result in people with disabilities needing to purchase multiple devices to obtain all the disability features that they require.<sup>377</sup> We find that a reasonable interpretation of Sections 716(g)(4) and 716(j)<sup>378</sup> calls for the bundling of features within a single device to serve a particular type of disability, if achievable. For example, if a series of features, such as a screen reader and a voice interactive menu, were required to be bundled into the same device to render the device accessible to people who are blind, then a common sense interpretation of the statute would require that these features be bundled together if achievable under the four factors.

147. We find that ITI misunderstands Sections 716(g)(4) and 716(j) when it asserts that covered entities are compliant “so long as some reasonable subset of features and services are accessible,”<sup>379</sup> because such an approach could result in lack of accessibility over the full range of functionality and prices. After carefully considering Section 716(j), we find a more reasonable interpretation to be that there may be some devices with accessibility features for people with one type of disability, different devices with accessibility features for people with other types of disabilities, and yet other devices that are not accessible because accessibility is not achievable for those particular devices or because the entity offers a full range of accessible products with varying degrees of functionality and features, at differing price points to discharge its responsibility under Section 716.<sup>380</sup> In other words, Section 716(j) provides a rule of reason when interpreting Section 716(g).

148. We decline at this time to designate a list of accessibility features that are easy to achieve.<sup>381</sup> Not only would such a list become outdated very quickly,<sup>382</sup> but it is impossible to assume that any given accessibility feature would be easy to achieve for every device or

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<sup>376</sup> See CEA Comments at 25-26. See also TechAmerica Comments at 8-9; TIA Comments at 18; CEA Reply Comments at 13.

<sup>377</sup> See Words+ and Compusult Comments at 25.

<sup>378</sup> The Section 716(j) Rule of Construction provides that “[t]his section [716] shall not be construed to require a manufacturer of equipment used for advanced communications or a provider of advanced communications services to make every feature and function of every device or service accessible for every disability.” 47 U.S.C. § 617(j).

<sup>379</sup> ITI Comments at 10.

<sup>380</sup> See ACB Reply Comments at 31-32. See also AFB Reply Comments at 11 (for a company to successfully argue that the Commission is out of step with section 716(j), the company must prove that compliance is required with respect to all of the company’s products and that all of those products are being required to address all disabling conditions); cf., ITI Comments at 10 (“[I]t may not be possible to make ACS accessible to every class of people with disabilities at this time.”)

<sup>381</sup> See CEA Comments at 25 (mandatory list would undermine the flexibility intent of the CVAA); CTIA Comments at 25-26 (such a list would be contrary to both the Section 716(g) achievability factors and the Section 716(j) rule of construction); IT and Telecom RERCs Comments at 23; TIA Comments at 18. *Contra* Words+ and Compusult Comments at 25; AAPD Reply Comments at 6.

<sup>382</sup> See CEA Comments at 25; CTIA Comments at 25-26; IT and Telecom RERCs Comments at 23; CEA Reply Comments at 13; Green Reply Comments at 7 (regulations requiring certain types of tools to be built-in will risk the result of reducing competition and incentives for application developers).

service.<sup>383</sup> Nevertheless, we strongly encourage, but do not require, all covered entities to offer accessibility features that are easy to achieve with every product.<sup>384</sup> By way of example, AFB suggests that audible output of menu functions and on-screen text is easy to achieve.<sup>385</sup> Although the record is insufficient to determine whether AFB's assertion is accurate, if a covered entity finds during the course of its achievability analysis that audible output of menu functions and on-screen text is easy to achieve in all of its products, we would encourage the covered entity to install audible output of menu functions and on-screen text in those products. Voluntary universal deployment of accessibility features that are easy to achieve as products evolve will further enable the maximum number of people with disabilities to enjoy access to products that people without disabilities take for granted.

## 2. Industry Flexibility

149. *Background.* Sections 716(a)(2) and (b)(2) of the Act provide manufacturers and service providers flexibility on how to ensure compliance with the accessibility requirements of the CVAA.<sup>386</sup> Specifically, a manufacturer or service provider may comply with these requirements either by building accessibility features into the equipment or service or by "using third party applications, peripheral devices, software, hardware, or customer premises equipment that is available to consumers at nominal cost and that individuals with disabilities can access."<sup>387</sup> While the Senate Report did not discuss these provisions, the House Report makes clear that the choice between these two options "rests solely with the provider or manufacturer."<sup>388</sup>

150. *Discussion.* As urged by several commenters, we confirm that Section 716 allows covered entities the flexibility to provide accessibility through either built-in solutions or third-party solutions, so long as the third-party solutions are available at nominal cost to consumers.<sup>389</sup> As suggested by TIA, we find that manufacturers and service providers should be able to rely on a wide range of third-party accessibility solutions and whether such solutions meet the accessibility requirements should be decided on a case-by-case basis.<sup>390</sup> Moreover, by putting the decision in the hands of the manufacturers and service providers – those who are in the best

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<sup>383</sup> See CTIA Comments at 25-26.

<sup>384</sup> IT and Telecom RERCs Comments at 23. For example, a nib on a 5 key would be easy to achieve for physical keys, *Accessibility NPRM*, 26 FCC Rcd at 3161, ¶ 76 and n.222, but appears not to be achievable at this time in the case of a touch screen. CTIA Comments at 26.

<sup>385</sup> AFB Reply Comments at 11.

<sup>386</sup> 47 U.S.C. § 617(a)(2), (b)(2). See *Accessibility NPRM*, 26 FCC Rcd at 3162, ¶ 77.

<sup>387</sup> 47 U.S.C. § 617(a)(2), (b)(2).

<sup>388</sup> House Report at 24.

<sup>389</sup> 47 U.S.C. §§ 617(a)(2), (b)(2); *Accessibility NPRM*, 26 FCC Rcd at 3162, ¶ 77. See CEA Comments at 26-27; CTIA Comments at 27; TIA Comments at 19; T-Mobile Comments at 11; Verizon Comments at 12; AAPD Reply Comments at 3; CEA Reply Comments at 14. *Contra* ACB Reply Comments at 34 (built in solutions should be the priority when technical factors do not prohibit those solutions). See also ITI Comments at 6 ("Where built-in AT is not achievable, the consumer is best served by rules that recognize the value of third-party AT providers. . .").

<sup>390</sup> TIA Comments at 21. See also Green Reply Comments at 8 (the flexibility for the developer to determine what applications to bundle with the operating system and what applications to leave to the secondary marketplace will allow individuals with disabilities to choose the best device for their needs and allow personalization over time).

position to determine the most economical manner of compliance – we ensure that the aims of the statute will be met in the most cost-effective manner. At the same time, we encourage such manufacturers and service providers who wish to use third party accessibility solutions, to consult with people with disabilities about their accessibility needs because these individuals will be best equipped to provide guidance on which third-party accessibility solutions will be able to meet those needs. Consultation with the disability community will best achieve effective and economical accessibility solutions.

151. The Commission acknowledged in the *Accessibility NPRM* that “universal design,” which is “a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies), and products and services that are interoperable with assistive technologies,”<sup>391</sup> will continue to play an important role in providing accessibility for people with disabilities. At the same time, the Commission acknowledged that, while Section 255 had relied primarily on universal design principles, the industry flexibility provisions of the CVAA reflect that there are new ways to meet the needs of people with disabilities that were not envisioned when Congress passed Section 255.<sup>392</sup> We agree with Consumer Groups that new and innovative technologies may now be able to more efficiently and effectively meet individual needs by personalizing services and products, than services and products built to perform in the same way for every person.<sup>393</sup> Accordingly, as supported by several commenters, we affirm that the Commission should afford manufacturers and service providers as much flexibility to achieve compliance as possible,<sup>394</sup> so long as each does everything that is achievable in accordance with the achievability factors.<sup>395</sup>

152. As supported by several commenters, we adopt the Commission’s proposal in the *Accessibility NPRM* that “any fee for third-party software or hardware accessibility solutions be ‘small enough so as to generally not be a factor in the consumer’s decision to acquire a product or service that the consumer otherwise desires.’”<sup>396</sup> We will apply this definition in accordance with the proposal submitted by AFB that in considering whether the cost to the consumer is nominal, we must look at the initial purchase price, including installation, plus the ongoing costs to the consumer to keep the third-party solution up to date and in good working order, and that the total

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<sup>391</sup> 29 U.S.C. § 3002(a)(19). See *Section 255 Report and Order*, 16 FCC Rcd at 6441, ¶ 50, n.138, citing Pub. L. No. 105-394, § 3(a)(17), November 13, 1998 (Assistive Technology Act of 1998).

<sup>392</sup> *Accessibility NPRM*, 26 FCC Rcd at 3162, ¶ 77.

<sup>393</sup> See Consumer Groups Comments at 19; Green Reply Comments at 3-4, 7 (Commission should promote multi-function devices, with accessibility built into the hardware and operating system, customizable to an individual’s specific needs through easy, inexpensive software downloads, which would allow a single type of device to be accessible to people with a range of disabilities).

<sup>394</sup> CEA Comments at 27; ITI Comments at 8; NCTA Comments at 3, 6; TIA Comments at 19; T-Mobile Comments at 2; TWC Comments at 5-7. For example, a person with low vision may choose a software program that enlarges the size of the text, while a person who is blind may select a screen reader.

<sup>395</sup> CEA Comments at 27. See also ITI Comments at 9; Green Reply Comments at 7 (requiring built-in solutions, as compared to after-market sale of a software application, would unduly limit the customizations available to a range of disabilities). See generally *Accessibility NPRM*, 26 FCC Rcd at 3162-3163, ¶ 77.

<sup>396</sup> *Accessibility NPRM*, 26 FCC Rcd at 3163, ¶ 78, quoting House Report at 24. See AFB Comments at 4; AT&T Comments at 10; CTIA Comments at 28; TIA Comments at 20; Verizon Comments at 12.

cost to the consumer must be nominal as perceived by the consumer.<sup>397</sup> We believe that this approach, which emphasizes the definition of nominal cost as perceived by the consumer, addresses the IT and Telecom RERCs' concerns that our proposed definition of nominal cost provides insufficient guidance and does not take into account that many people with disabilities are poor and already face greater costs for nearly every aspect of their lives.<sup>398</sup> In other words, the definition of nominal cost as perceived by the consumer will take into account the financial circumstances generally faced by people with disabilities.

153. As suggested by several commenters, we will not adopt a fixed percentage definition for nominal cost.<sup>399</sup> We are mindful of T-Mobile's concern that we should not interpret the term nominal cost so narrowly as to negate the opportunity for third-party accessibility solutions.<sup>400</sup> As supported by several commenters, we will therefore determine whether the cost of a third-party solution is nominal on a case-by-case basis,<sup>401</sup> taking into consideration the nature of the service or product,<sup>402</sup> including its total lifetime cost.<sup>403</sup>

154. Several commenters also express concerns about the Commission's proposal in the *Accessibility NPRM* that a third-party solution not be more burdensome to a consumer than a built-in solution would be,<sup>404</sup> arguing that this test would not be workable because it would result in no third-party solutions.<sup>405</sup> In response to these concerns, we clarify how we intend to interpret those requirements to ensure their workability. Because adaptive communications solutions are often not available with mainstream products and finding these solutions often has been difficult

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<sup>397</sup> See AFB Comments at 4. See also AT&T Comments at 11 (service providers and manufacturers should be permitted to initially subsidize and spread out the cost of an accessibility solution to the consumer so long as the cost at the time of purchase plus all additional costs over time qualify as nominal as perceived by the consumer); Words+ Compusult Comments at 28. *Contra*, Green Reply Comments at 9 (do not add on third-party costs to the monthly service fee).

<sup>398</sup> See IT and Telecom RERCs Comments at 24. See also ACB Reply Comments at 37 (nominal means "so small or trivial as to be a mere token"); Letter from Andrew S. Phillips, Counsel to National Association of the Deaf, on behalf of the Coalition of Organizations for Accessible Technology ("COAT"), to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2 (filed Oct. 3, 2011) ("COAT Oct. 3 *Ex Parte*") ("people with disabilities are experiencing the highest unemployment rates of any minority groups"); Green Reply Comments at 9, 12 (add-on costs should be measured in dollars, not hundreds of dollars; it will do no good to make technologies accessible to people with disabilities if they cannot afford it). *But see* CEA Reply Comments at 15 (it is unworkable to consider nominal cost subjectively from the point of view of the consumer).

<sup>399</sup> See CEA Comments at 27; CTIA Comments at 28; TIA Comments at 20; T-Mobile Comments at 11; Verizon Comments at 12; T-Mobile Reply Comments at 13. *Contra*, Green Reply Comments at 9.

<sup>400</sup> See T-Mobile Comments at 10-11; T-Mobile Reply Comments at 13.

<sup>401</sup> See CEA Comments at 27; TIA Comments at 20; Verizon Comments at 12; CEA Reply Comments at 15; CTIA Reply Comments at 25.

<sup>402</sup> See CEA Comments at 27; Verizon Comments at 12; CTIA Reply Comments at 25.

<sup>403</sup> See CEA Comments at 27; CTIA Comments at 28; T-Mobile Comments at 10; CTIA Reply Comments at 25; T-Mobile Reply Comments at 13.

<sup>404</sup> *Accessibility NPRM*, 26 FCC Rcd at 3164, ¶ 80.

<sup>405</sup> CEA Comments at 28; TIA Comments at 21; CEA Reply Comments at 14. *Contra*, Consumer Groups Comments at 19; IT and Telecom RERCs Comments at 25.

for people with disabilities in the past,<sup>406</sup> we agree with those commenters that assert that a manufacturer or service provider that chooses to use a third-party accessibility solution has the responsibility to identify, notify consumers of, find, and arrange to install and support the third-party technology along with the covered entity's product to facilitate consumer access to third-party solutions.<sup>407</sup> We find that the covered entity must support the third-party solution for the life of the ACS product or service or for a period of up to two years after the third-party solution is discontinued, whichever comes first,<sup>408</sup> provided that another third-party accessibility solution is made available by the covered entity at nominal cost to the consumer. In other words, to ensure accessibility of products and services covered by the CVAA, if another third-party solution is not made available by the covered entity at nominal cost to the consumer, then the covered entity may not discontinue support for the original third-party solution.<sup>409</sup>

155. We agree with those commenters that suggest that we should not impose a requirement to bundle third-party solutions with ACS products and services,<sup>410</sup> because a bundling requirement would provide industry with less flexibility than Congress intended.<sup>411</sup> Therefore, third-party solutions can be made available after-market, rather than at the point of purchase,<sup>412</sup> provided that such third-party solutions are made available around the same time as when the product or service is purchased. This will ensure that the consumer has access to the product near the time of purchase, allow for additional implementation steps that may be needed,<sup>413</sup> and promote innovation by reducing the likelihood of being locked into the

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<sup>406</sup> *Accessibility NPRM*, 26 FCC Rcd at 3164, ¶ 80 n.237.

<sup>407</sup> See Consumer Groups Comments at 19; IT and Telecom RERCs Comments at 25; ACB Reply Comments at 34; CTIA Reply Comments at 23-24; IT and Telecom RERCs Reply Comments at 3. See also AFB Comments at 4 (covered entities can rely only on third-party solutions that are available in the market). Although we will not adopt the testing requirements proposed by the IT and Telecom RERCs because we believe that the other requirements we adopt herein with respect to third-party solutions will ensure accessibility of ACS products and services to consumers with disabilities, we nevertheless encourage covered entities to test third-party accessibility solutions with people with disabilities to ensure that such third-party solutions work as intended. See IT and Telecom RERCs Comments at 25; cf. CTIA Reply Comments at 24 (no obligation in CVAA to test third-party accessibility solutions with other major third-party applications).

<sup>408</sup> See TIA Comments at 21-22; cf. CEA Comments at 28; CEA Reply Comments at 14-15 (opposes any requirement to support a third-party solution over the life of the product on the grounds that the covered entity has no direct involvement with such support, which is undertaken by the third-party vendor).

<sup>409</sup> See CTIA Comments at 28 (covered entities should be able to change their means of compliance, as long as the third-party solution remains at nominal cost). We believe that the requirement to provide support for a replacement third-party accessibility solution addresses the concern expressed by the IT and Telecom RERCs Reply Comments at 4 (propose covered entity support of the third-party solution for the same period as the underlying ACS product is supported).

<sup>410</sup> *Accessibility NPRM*, 26 FCC Rcd at 3164, ¶ 80.

<sup>411</sup> See CEA Comments at 28 (a bundling requirement would also impose particular relationships between covered entities and third-party vendors); TIA Comments at 22; T-Mobile Comments at 11.

<sup>412</sup> See CEA Comments at 27; CTIA Comments at 27; TIA Comments at 21; T-Mobile Comments at 11; Verizon Comments at 12; T-Mobile Reply Comments at 12-13. *Contra*, ACB Reply Comments at 34 (third-party solutions cannot be an after-market sale for which the user must perform additional steps to obtain).

<sup>413</sup> See CEA Comments at 27.

accessibility solutions available at the time the product was offered for sale.<sup>414</sup>

156. As explained in the preceding paragraphs, the total cost to the consumer of the third-party solution, including set-up and maintenance, must be nominal. We expect the set-up and maintenance for a third-party accessibility solution to be no more difficult than the set-up and maintenance for other applications used by consumers.<sup>415</sup> If the third-party solution by its nature requires technical assistance with set-up or maintenance, we find that the covered entity must either provide those functions, including personnel with specialized skills if needed,<sup>416</sup> or arrange for a third party to provide them.

157. We reject Verizon's argument that manufacturers and service providers should not be required to provide support for the third-party solutions, because such a requirement would effectively require a contractual relationship, including intricate knowledge of the third party's proprietary solution, where none may exist.<sup>417</sup> Verizon's theory would conflict with the plain meaning of Sections 716(a)(2) and (b)(2), which afford manufacturers and service providers the option to rely on third-party solutions to ensure that their products and services are accessible if achievable.<sup>418</sup> If the covered entities elect to offer third-party solutions to achieve accessibility but do not support such third-party solutions, they would be undermining the availability of such solutions.<sup>419</sup>

### 3. Compatibility

158. *Background.* Under Section 716(c) of the Act, whenever accessibility is not achievable either by building in access features or using third-party accessibility solutions as set forth in Sections 716(a) and (b), a manufacturer or service provider must "ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access," unless that is not achievable.<sup>420</sup> Section 255 contains a similar compatibility requirement for telecommunications service providers and manufacturers if it is readily achievable to do so, in cases where built-in accessibility is not readily achievable. Our Section 255 rules define

<sup>414</sup> See CEA Comments at 27-28; CTIA Comments at 28.

<sup>415</sup> See IT and Telecom RERCs Comments at 25 (a third-party solution needs to be equally compatible, interoperable, and simple to set up and use with the ACS device or service); ACB Comments to *October Public Notice* at 14; ACB Reply Comments at 34 (a third-party solution should not require set-up or maintenance by a person without disabilities); Green Reply Comments at 7-8 (installation should be no more burdensome than installations by a typical user, or in the alternative, no more burdensome than a sales associate at a Verizon store can handle).

<sup>416</sup> Words+ and Compusult Comments at 28 ("third party add-ons are too specialized for ACS's representatives to be properly trained [to] explain, demonstrate, to match a customer's needs or set up for the user.").

<sup>417</sup> See Verizon Comments at 13.

<sup>418</sup> 47 U.S.C. §§ 716(a)(2), (b)(2).

<sup>419</sup> Consumer Groups Reply Comments at 2, 4 (Commission should not allow manufacturers and service providers to rely upon third-party solutions to satisfy CVAA obligations but disclaim any responsibility for the compliance of such third-party solutions); IT and Telecom RERCs Reply Comments at 3 (if a manufacturer does not want the burden of contracts and collaboration with third parties, the manufacturer can opt for a built-in solution).

<sup>420</sup> See 47 U.S.C. § 617(c).

peripheral devices to mean “devices employed in connection with equipment covered by this part to translate, enhance or otherwise transform telecommunications into a form accessible to individuals with disabilities.”<sup>421</sup> The Commission’s Section 255 rules define specialized CPE as customer premises equipment that is commonly used by individuals with disabilities to achieve access.<sup>422</sup>

159. For purposes of Section 716, in the *Accessibility NPRM*, the Commission proposed to define peripheral devices as “devices employed in connection with equipment, including software, covered under this part to translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities.”<sup>423</sup> The Commission also proposed to define specialized CPE, consistent with our Section 255 rules, as “customer premises equipment which is commonly used by individuals with disabilities to achieve access.”<sup>424</sup>

160. Under our Section 255 rules, we use four criteria for determining compatibility: (i) external electronic access to all information and control mechanisms; (ii) existence of a connection point for external audio processing devices; (iii) TTY connectability; and (iv) TTY signal compatibility.<sup>425</sup> In the *Accessibility NPRM*, the Commission asked whether the four criteria listed above remain relevant in the context of advanced communications services.<sup>426</sup> Noting that a sizeable majority of consumers who previously relied on TTYs for communication are transitioning to more mainstream forms of text and video communications,<sup>427</sup> the Commission sought comment on whether it should encourage an efficient transition by phasing out the third and fourth criteria as compatibility components in our Section 716 rules and/or in our Section 255 rules.<sup>428</sup> The Commission also sought comment on whether it should ensure that these requirements are phased out only after alternative forms of communication, such as real-time text, are in place.<sup>429</sup>

161. In the *Accessibility NPRM*, the Commission also sought comment on whether and how it should use the Access Board Draft Guidelines to help define compatibility for purposes of Section 716.<sup>430</sup> Finally, the Commission inquired about the status of industry development of APIs and whether incorporating criteria related to APIs into our definition of

<sup>421</sup> 47 C.F.R. §§ 6.3(g), 7.3(g).

<sup>422</sup> 47 C.F.R. §§ 6.3(i), 7.3(i).

<sup>423</sup> *Accessibility NPRM*, 26 FCC Rcd at 3166, ¶ 87.

<sup>424</sup> *Accessibility NPRM*, 26 FCC Rcd at 3166, ¶ 87. See 47 C.F.R. §§ 6.3(c) and 7.3(c).

<sup>425</sup> 47 C.F.R. § 6.3.

<sup>426</sup> *Accessibility NPRM*, 26 FCC Rcd at 3166, ¶ 88.

<sup>427</sup> *Accessibility NPRM*, 26 FCC Rcd at 3166, ¶ 88.

<sup>428</sup> *Accessibility NPRM*, 26 FCC Rcd at 3166, ¶ 88.

<sup>429</sup> *Accessibility NPRM*, 26 FCC Rcd at 3166-3167, ¶ 88. We note that elsewhere in the CVAA, the Commission is directed to establish an advisory committee whose task is, in part, to consider “[t]he possible phase out of the use of current-generation TTY technology to the extent that this technology is replaced with more effective and efficient technologies and methods to enable access to emergency services by individuals with disabilities.” Pub. L. No. 111-260, § 106(c)(6).

<sup>430</sup> *Accessibility NPRM*, 26 FCC Rcd at 3167, ¶ 89.

compatibility could promote the development of APIs.<sup>431</sup>

162. *Discussion.* We adopt the definition of “peripheral devices” proposed in the *Accessibility NPRM*.<sup>432</sup> We agree with the vast majority of commenters that peripheral devices can include mainstream devices and software,<sup>433</sup> as long as they can be used to “translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities” and the devices and software are “commonly used by individuals with disabilities to achieve access.” We did not receive comments on the IT and Telecom RERCs proposal to expand our definition of peripheral devices and decline to adopt their proposal at this time.<sup>434</sup> However, we seek further comment in the accompanying *Further Notice* on its proposal.

163. We also adopt the same definition of specialized CPE as is used in our Section 255 rules<sup>435</sup> and proposed in the *Accessibility NPRM*.<sup>436</sup> The Commission has traditionally interpreted CPE broadly to include wireless devices such as cellular telephone handsets, and we retain the flexibility to construe the scope of specialized CPE consistent with Commission precedent.<sup>437</sup> Therefore, changing the regulatory definition of CPE, as the IT and Telecom RERCs suggest, to explicitly include mobile devices carried by the user is unnecessary.<sup>438</sup> We also note that a mobile device could meet the definition of a peripheral device to the extent that it is used to “translate, enhance, or otherwise transform advanced communications services into a

<sup>431</sup> *Accessibility NPRM*, 26 FCC Rcd at 3167, ¶ 90.

<sup>432</sup> See *Accessibility NPRM*, 26 FCC Rcd at 3196, Subpart B – Definitions, § 8.4(r).

<sup>433</sup> See AT&T Comments to *October Public Notice* at 9; CEA Comments to *October Public Notice* at 12; RERC-IT Comments to *October Public Notice* at 6; TIA Comments to *October Public Notice* at 15-16; Words+ PN Comments to *October Public Notice* at 2; AAPD Reply Comments to *October Public Notice* at 4; AbleLink Reply Comments to *October Public Notice* at 1; ACB Reply Comments to *October Public Notice* at 18; Adaptive Solutions Reply Comments to *October Public Notice* at 1; Compusult Reply Comments to *October Public Notice* at 1; CTIA Reply Comments to *October Public Notice* at 14-15; RERC-IT Reply Comments to *October Public Notice* at 6; Point-and-Read Comments to *October Public Notice* at 1; Wireless RERC Reply Comments to *October Public Notice* at 4; CEA Comments at 29-30; Consumer Groups Comments at 21; IT and Telecom RERCs Comments at 26; T-Mobile Comments at 13; T-Mobile Reply Comments at 15.

<sup>434</sup> The IT and Telecom RERCs proposed to define peripheral devices as “devices employed in connection with equipment covered by this part, including software and electronically mediated services, to translate, enhance, or otherwise transform advanced communications services into a form accessible to people with disabilities” (emphasis added). IT and Telecom RERCs Comments at 27-28. See *Accessibility NPRM*, 26 FCC Rcd at 3196, Subpart B – Definitions, § 8.4(r).

<sup>435</sup> See 47 C.F.R. §§ 6.3(i) and 7.3(i). See also 47 C.F.R. §§ 6.3(c) and 7.3(c) (defining “customer premises equipment”).

<sup>436</sup> See *Accessibility NPRM*, 26 FCC Rcd at 3196, Subpart B – Definitions, § 8.4(v).

<sup>437</sup> See, e.g., *Bundling of Cellular Premises Equipment and Cellular Service*, CC Docket No. 91-34, Report and Order, DA 92-207, 7 FCC Rcd 4028, ¶ 9 (1992); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Order, DA 98-971, 13 FCC Rcd. 12390, 12394, ¶ 5 (1998).

<sup>438</sup> IT and Telecom RERCs Comments at 28. The term “customer premises equipment” means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications. 47 U.S.C. § 153(16),

form accessible to people with disabilities.”<sup>439</sup>

164. Consistent with the Commission’s decision in the *Section 255 Report and Order*, we will require manufacturers and service providers to exercise due diligence to identify the types of peripheral devices and specialized CPE “commonly used” by people with disabilities with which their products and services should be made compatible.<sup>440</sup> We also find that when determining whether a particular device is commonly used by individuals with disabilities, a manufacturer or provider should look at the use of that device among persons with a particular disability.<sup>441</sup> In addition, we agree with AFB that for compatibility to be achieved, a third party add-on must be an available solution that the consumer can access to make the underlying product or service accessible.<sup>442</sup> Compliance is not satisfied because a device’s software architecture might someday allow a third party to write an accessibility application.<sup>443</sup> We agree with ITI, however, that “a manufacturer or service provider need not make its equipment or service compatible with every peripheral device or piece of customer equipment used to achieve access.”<sup>444</sup> Covered entities are also not required to test compatibility with every assistive technology device in the market.<sup>445</sup>

165. Consistent with the *Section 255 Report and Order*, we decline to maintain a list of peripheral devices and specialized CPE commonly used by individuals with disabilities or to define how covered entities should test devices which are “commonly used” by people with disabilities, given how quickly technology is evolving.<sup>446</sup> For the same reason, we agree with the IT and Telecom RERCs that covered entities do not have a duty to maintain a list of all peripheral devices and specialized CPE used by people with disabilities.<sup>447</sup> At this time, we also decline to limit the definition of “existing” peripheral devices and specialized customer premises equipment to those that are currently sold, as ITI proposes.<sup>448</sup> As discussed above, we believe that “existing” peripheral devices and specialized customer premises equipment include those which continue to be “commonly used” by people with disabilities.<sup>449</sup> For example, a particular screen reader may no longer be manufactured,<sup>450</sup> but could still be “commonly used.” We do note, however, that peripheral devices and specialized customer premises equipment that are no longer sold will eventually cease being “commonly used.” We also believe that covered entities have an ongoing

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<sup>439</sup> *Accessibility NPRM*, 26 FCC Rcd at 3196, Subpart B – Definitions, § 8.4(r). *See generally*, IT and Telecom RERCs Comments at 28.

<sup>440</sup> *Section 255 Report and Order*, 16 FCC Rcd at 6435, ¶ 36. *See also* AFB Comments at 3.

<sup>441</sup> *Section 255 Report and Order*, 16 FCC Rcd at 6435, ¶ 36.

<sup>442</sup> AFB Comments at 3-4; AAPD Reply Comments at 3.

<sup>443</sup> AFB Comments at 4.

<sup>444</sup> ITI Comments at 12. *See also* CTIA Sept. 30 *Ex Parte* at 2.

<sup>445</sup> TIA Comments at 34.

<sup>446</sup> *Section 255 Report and Order*, 16 FCC Rcd at 6435, ¶ 36. *But see* ITI Comments at 12; TIA Comments at 33-34.

<sup>447</sup> IT and Telecom RERCs Comments at 27.

<sup>448</sup> *But see* ITI Comments at 11-12; ITI July 8 *Ex Parte* at 3.

<sup>449</sup> *Section 255 Report and Order*, 16 FCC Rcd at 6435, ¶ 36.

<sup>450</sup> ITI July 8 *Ex Parte* at 3.

duty to consider how to make their products compatible with the software and hardware components and devices that people with disabilities use to achieve access and to include this information in their records required under Section 717(a)(5).<sup>451</sup>

166. In declining to limit the definition of “existing” peripheral devices and specialized customer premises equipment to those that are currently sold, we recognize that we may be imposing an additional burden on industry resources. We are open to any idea that could facilitate transition without consumers having to bear the costs. In reaching this decision, we acknowledge this additional burden against the benefits of maintaining access for consumers with disabilities to “commonly used” peripheral devices and specialized customer premises equipment. We believe that ensuring that people with disabilities continue to have access to “commonly used” technologies that facilitate their ongoing participation in economic and civic activities outweighs the burden on industry and furthers the statute’s overriding objective “[t]o increase the access of persons with disabilities to modern communications.”<sup>452</sup>

167. Finding that the four criteria used in our Section 255 rules for determining compatibility remain relevant in the context of advanced communications services, we adopt the following factors for determining compatibility: (i) external access to all information and control mechanisms; (ii) existence of a connection point for external audio processing devices; (iii) TTY connectability; and (iv) TTY signal compatibility.<sup>453</sup> The Commission declines, at this time, to eliminate or modify (iii) and (iv) of this criteria.<sup>454</sup> The Commission agrees with Consumer Groups that at this time, “[a] forced phase-out of TTY would impose considerable hardship on a large segment of the population the CVAA is intended to protect.”<sup>455</sup> Therefore, we shall maintain the existing rules for TTY compatibility until alternative forms of communication, such as real-time text, are in place.<sup>456</sup>

168. At this time, the Commission will not incorporate criteria related to APIs or

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<sup>451</sup> See 47 U.S.C. § 618(a)(5). Under Section 717(a)(5)(iii), covered entities are required to maintain “information about the compatibility of [their] products and services with peripheral devices or specialized [CPE] commonly used by individuals with disabilities to achieve access.”

<sup>452</sup> Pub. L. No. 111-260, 124 Stat. 2751, pmb1.

<sup>453</sup> 47 C.F.R. § 6.3. While we encourage industry to develop standards to promote compatibility and “to develop new and innovative solutions for people with disabilities,” see ITI Comments at 13, we note that abiding by such standards does not eliminate covered entities’ obligations to adhere to the four compatibility factors discussed below.

<sup>454</sup> But see CEA Comments at 30; IT and Telecom RERCs Comments at 27.

<sup>455</sup> Consumer Groups at 22; Consumer Groups Reply Comments at 6.

<sup>456</sup> Until a real time text standard is adopted, we believe that it would be premature to modify the third and fourth criteria as the IT and Telecom RERCs suggest. IT and Telecom RERCs Comments at 28. The provision of real-time text as communications technologies, including those used for 9-1-1 emergency services by people with disabilities, transition from the PSTN to an IP-based environment is being examined by the EAAC. See *supra* note 40. The EAAC held its first meeting on January 14, 2011 and will provide its recommendations to the Commission in December 2011. See Pub. L. No. 111-260, § 106(c)(1). The Commission has initiated a rulemaking seeking to accelerate the development and deployment of Next Generation 911 (NG911) technology that will enable the public to send emergency communications to 911 Public Safety Answering Points (PSAPs) via text, photos, videos, and data. *Framework for Next Generation 911 Deployment*, PS Docket No. 10-255, FCC 11-134, Notice of Proposed Rulemaking, (released Sept. 22, 2011).

software development kits (SDKs) into our definition of compatibility.<sup>457</sup> We do agree with commenters, however, that APIs “can facilitate both accessibility (via third-party solutions) as well as compatibility” and “reduce the work needed by both mainstream and assistive technology (AT) developers.”<sup>458</sup> We encourage stakeholders to use existing working groups -- or form new ones -- to develop and distribute voluntary industry-wide standards, since this approach will offer the industry flexibility in advancing the goals of compatibility articulated in Sections 716 and 255.<sup>459</sup>

169. Several commenters generally support the Access Board’s proposed definition of “compatibility” and the VON Coalition suggests that the Commission should defer to the Access Board’s determination of “compatibility” under Section 508, thereby creating consistency between the CVAA and Section 508.<sup>460</sup> Because the Access Board has not yet completed its guidelines process, we will not adopt the Access Board’s proposed definition of “compatibility” at this time but may revisit this decision after the Access Board completes its guidelines process.<sup>461</sup>

### C. Waivers and Exemptions

#### 1. Customized Equipment or Services

170. *Background.* Section 716(i) states that the accessibility requirements of Section 716 “shall not apply to customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”<sup>462</sup> In the *Accessibility NPRM*, the Commission found that the CVAA’s legislative history evinced Congress’s intent that the Section 716(i) exemption be narrow in scope and applicable only to customized equipment and services offered to business or other enterprise customers, rather than to equipment and services “used by members of the general public.”<sup>463</sup> The Commission sought comment on this analysis, as well as on the extent to which the equipment and services used by private institutions but made available to the public, such as communications equipment and services used by libraries and schools, should be covered by the CVAA. The Commission also sought comment on how to define equipment and services that are “used by members of the general public.”<sup>464</sup> Finally, the Commission sought comment on the extent to which Section 716 covers products and services that are offered to the general

<sup>457</sup> CEA Reply Comments at 15. *But see* Microsoft Comments at 14.

<sup>458</sup> CEA Comments at 30; IT and Telecom RERCs Comments at 29; Words+ and Compusult Comments at 32. *See also* VON Coalition Comments at 8 (“Devices in which accessibility is not achievable but compatibility with assistive technologies is required, accessibility programming interfaces are critical in enabling interoperability between the two.”).

<sup>459</sup> Words+ and Compusult Comments at 27-28; CEA Reply Comments at 15-16. *See Section 255 Report and Order*, 16 FCC Rcd at 6434, ¶ 35.

<sup>460</sup> IT and Telecom RERCs Comments at 29; Words+ and Compusult Comments at 31; VON Coalition Comments at 8. *But see* ACB Reply Comments at 38 (agreeing that “the proposed Access Board guidelines may be useful to consider but should not be relied on as anything more than advisory material.”); AFB Reply Comments at 12.

<sup>461</sup> CEA Comments at 29-30; TIA Comments at 33; Verizon Comments at 13.

<sup>462</sup> *See* 47 U.S.C. § 617(i).

<sup>463</sup> *Accessibility NPRM*, 26 FCC Rcd at 3152, ¶ 50 (citing House Report at 26).

<sup>464</sup> *Accessibility NPRM*, 26 FCC Rcd at 3152, ¶ 50.

public, but which have been customized in minor ways to meet the needs of private entities.

171. *Discussion.* We hereby find that Section 716(i) sets forth a narrow exemption that should be limited in scope to customized equipment and services offered to business and other enterprise customers only. Our decision is consistent with the legislative history of the CVAA, which demonstrates that Congress intended for Section 716(i) to be a narrow exemption limited to specialized and innovative equipment or services built to the unique specifications of businesses:

The Committee recognizes that some equipment and services are customized to the unique specifications requested by an enterprise customer. The Committee believes this narrow exemption will encourage technological innovation by permitting manufacturers and service providers to respond to requests from businesses that require specialized and sometimes innovative equipment to provide their services efficiently. This provision is not intended to create an exemption for equipment and services designed for and used by members of the general public.<sup>465</sup>

172. We also conclude that Section 716's accessibility requirements do not extend to public safety communications networks and devices, because such networks and devices are "equipment and services that are not offered directly to the public."<sup>466</sup> As Motorola points out, this conclusion is consistent with the Commission's recent proposal not to apply its hearing aid compatibility requirements to public safety equipment.<sup>467</sup> In that proceeding, the Commission proposed to find that insofar as public safety communications networks have different technical, operational, and economic demands than consumer networks, the burdens of compliance would outweigh the public benefits.<sup>468</sup> For the same reasons, we find that Section 716 should not be imposed on public safety equipment.

173. We disagree with commenters such as Consumer Groups, and Words+ and Compusult who posit that public safety networks and devices should not be exempt from Section 716 because their employees should be covered like the general population.<sup>469</sup> These commenters argue that exempting public safety networks will create barriers to employment for people with disabilities employed in the public safety sector.<sup>470</sup> We note, however, that employers, including public safety employers, are subject to accessibility obligations imposed under the ADA.<sup>471</sup>

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<sup>465</sup> House report at 26.

<sup>466</sup> See 47 U.S.C. § 617(i). See also Motorola Comments at 4-6,

<sup>467</sup> Motorola Comments at 4-6. See also *Hearing Aid Compatibility FNPRM*, 25 FCC Rcd at 11195, ¶ 82 (consistent with distinctions drawn in past, the Commission proposed not to extend hearing aid compatibility rules to certain non-interconnected systems used solely for internal communications, such as public safety or dispatch networks).

<sup>468</sup> *Hearing Aid Compatibility FNPRM*, 25 FCC Rcd at 11195, ¶ 82.

<sup>469</sup> Words+ and Compusult Comments at 17; Consumer Groups Comments at 12.

<sup>470</sup> Words+ and Compusult Comments at 17; Consumer Groups Comments at 12.

<sup>471</sup> See ITI Comments at 21. We therefore have modified the definition of "customized equipment or services" as proposed in the *Accessibility NPRM* to delete the phrase, "but shall not apply to equipment distributed to and services used by public or private sector employees, including public safety employees."

Because employees of public safety institutions are protected by the ADA, and because the equipment we exempt is customized for the unique needs of the public safety community, we conclude that imposing the accessibility requirements of Section 716 on such equipment would create an unnecessary burden on the development of public safety equipment without any concomitant benefit for employees with disabilities. Nonetheless, we agree with CSD that “to the extent possible, public safety systems should be designed to accommodate the needs of deaf [and] hard-of-hearing employees and employees with other disabilities.”<sup>472</sup>

174. We agree with CEA that products customized by a manufacturer for an enterprise that are not offered directly to the general public are exempt, even if such products are “used by members of the general public.”<sup>473</sup> We also agree with the IT and Telecom RERCs that if a customized product built to an enterprise customer’s unique specifications is later made directly available to the public, it then becomes subject to the CVAA.<sup>474</sup> Although the legislative history specifies that the exemption set forth in Section 716(i) encompasses equipment/services customized to the “unique specifications requested by an enterprise customer,” we find that where a customized product is subsequently offered directly to the public by the originating manufacturer or service provider, that product is then not serving the unique needs of an enterprise customer and thus should not be exempt from the accessibility requirements of Section 716.

175. We disagree with commenters such as Consumer Groups, the IT and Telecom RERCs, and Words+ and Compusult who advocate that we expand the definition of “public” as used in Section 716(i), to include government agencies, educational organizations, and public institutions.<sup>475</sup> While Congress clearly meant to draw a distinction between equipment or a service that has been “customized to the unique specifications requested by an enterprise customer” from “equipment and services designed for and used by members of the general public” in enacting the exemption in Section 716(i),<sup>476</sup> there is no support for the proposition that the use of the term “public” in the foregoing phrase was meant to extend to public institutions. Furthermore, there are many instances where public institutions, acting as enterprise customers, order customized equipment, such as library cataloging systems, whereby such systems would never be designed for, sold to, and used directly by members of the general public. Under Consumer Groups’ approach, a public institution could never be considered an enterprise customer, even when procuring specialized equipment that would not be offered to the public or even other enterprise customers. There is nothing in the statute demonstrating that Congress intended to treat public institutions differently from other enterprise customers who are in need of customized or specialized equipment. Therefore, we decline to expand the definition of the word “public” as used in Section 716(i) to public institutions.<sup>477</sup>

176. We further conclude that customizations to communications devices that are

<sup>472</sup> CSD Reply Comments to *October Public Notice* at 4.

<sup>473</sup> CEA Comments at 16-17; CEA Reply Comments at 9-10.

<sup>474</sup> IT and Telecom RERCs Reply Comments at 4.

<sup>475</sup> Consumer Groups Comments at 12; IT and Telecom RERCs Comments at 15-16; Words+ and Compusult Comments at 17.

<sup>476</sup> CTIA Comments at 23. See House Report at 26.

<sup>477</sup> Equipment, such as general purpose computers, that are used by libraries and schools without customization, and are offered to the general public – i.e., library visitors and students, would not fall within the exemption and must meet the accessibility requirements of Section 716.

merely cosmetic or do not significantly change the functionalities of the device or service should not be exempt from Section 716. We agree with Words+ and Compusult that the Section 716(i) exemption should be narrowly construed, and further agree with Consumer Groups that manufacturers and service providers should not be able to avoid the requirements of the CVAA through customizations that are “merely cosmetic” or have “insignificant change to functionality” of the product/service.<sup>478</sup> We note that the majority of commenters support the conclusion that this exemption should not extend to equipment or services that have been customized in “minor ways” or “that are made available to the public.”<sup>479</sup>

177. Beyond the narrow exemption that we carve out today for public safety communications, we refrain from identifying any other particular class of service or product as falling within the Section 716(i) exemption. We disagree with NetCoalition that the exemption should apply to ACS manufacturers or service providers who offer their products to a “discrete industry segment” and only a “relatively small number of individuals.” The exemption is not based on the characteristics of the manufacturer or the provider, but rather, on whether the particular equipment or service in question is unique and narrowly tailored to the specific needs of a business or enterprise.

178. The customized equipment exemption will be self-executing. That is, manufacturers and providers need not formally seek an exemption from the Commission, but will be able to raise 716(i) as a defense in an enforcement proceeding.

## **2. Waivers for Services or Equipment Designed Primarily for Purposes other than Using ACS**

179. *Background.* Section 716(h)(1) of the Act grants the Commission the authority to waive the requirements of Section 716. Specifically, Section 716(h)(1) states:

The Commission shall have the authority, on its own motion or in response to a petition by a manufacturer or provider of advanced communications services or any interested party, to waive the requirements of [Section 716] for any feature or function of equipment used to provide or access advanced communications services, or for any class of such equipment, for any provider of advanced communications services, or for any class of such services, that —

(A) is capable of accessing an advanced communications service; and

(B) is designed for multiple purposes, but is designed primarily for purposes other than using advanced communications services.<sup>480</sup>

Both the House and Senate Reports state that Section 716(h) “provides the Commission with the flexibility to waive the accessibility requirements for any feature or function of a device that is capable of accessing [ACS] but is, in the judgment of the Commission, designed primarily for purposes other than accessing advanced communications.”<sup>481</sup>

<sup>478</sup> See Consumer Groups Comments at 12; Words+ and Compusult Comments at 17.

<sup>479</sup> Consumer Groups Comments at 12; CTIA Comments at 23; ITI Comments at 22; Motorola Comments at 3.

<sup>480</sup> 47 U.S.C. § 617(h)(1).

<sup>481</sup> House Report at 26; Senate Report at 8.

180. In the *Accessibility NPRM* the Commission proposed to focus its waiver inquiry on whether the offering is designed primarily for purposes other than using ACS,<sup>482</sup> and sought comment on substantive factors for its waiver analysis.<sup>483</sup> The Commission also sought comment generally on the waiver petition review process, and the extent to which any procedures need to be adopted to ensure the process is effective and efficient.<sup>484</sup>

181. *Discussion.* We adopt the Commission's proposal to focus our waiver inquiry on whether a multipurpose equipment or service has a feature or function that is capable of accessing ACS but is nonetheless designed primarily for purposes other than using ACS. This approach is founded in the statutory language.<sup>485</sup> We disagree with the IT and Telecom RERCs' assertion that our waiver analysis should focus on whether the *features or functions* are designed primarily for purposes other than using ACS.<sup>486</sup> The statute specifically anticipates waivers for multipurpose *equipment* and *services* or classes of such equipment and services with ACS features or functions.<sup>487</sup> As the House and Senate Reports explain, "a device designed for a purpose unrelated to accessing advanced communications might also provide, on an incidental basis, access to such services. In this case, the Commission may find that to promote technological innovation the accessibility requirements need not apply."<sup>488</sup>

182. We will exercise the authority granted under Section 716(h)(1) to waive the requirements of Section 716<sup>489</sup> through a case-by-case, fact-based analysis on our own motion, or upon petition of a manufacturer of ACS equipment, a provider of ACS, or any interested party.<sup>490</sup> AT&T and CEA generally support this approach.<sup>491</sup> As we discuss in more detail below, the rule we adopt provides specific guidance on the two factors that we will use to determine whether equipment or service is designed primarily for purposes other than using ACS.

183. We will examine whether the equipment or service was designed to be used for advanced communications service purposes by the general public. We agree that the language of the statute requires an examination of the purpose or purposes for which the manufacturer or service provider designed the product or service and that consumer use patterns may not always accurately reflect design.<sup>492</sup> Therefore, this is not an examination of post-design uses that

<sup>482</sup> *Accessibility NPRM*, 26 FCC Rcd at 3153, ¶ 53.

<sup>483</sup> *Accessibility NPRM*, 26 FCC Rcd at 3153-54, ¶¶ 54-55.

<sup>484</sup> *Accessibility NPRM*, 26 FCC Rcd at 3154-55, ¶¶ 56-58.

<sup>485</sup> 47 U.S.C. § 617(h)(1). Several commenters support this approach. See AT&T Comments at 7; CEA Comments at 19; NetCoalition Comments at 6; VON Coalition Comments at 6.

<sup>486</sup> IT and Telecom RERCs Comments at 17.

<sup>487</sup> 47 U.S.C. § 617(h)(1).

<sup>488</sup> House Report at 26; Senate Report at 8.

<sup>489</sup> A waiver of the obligations of Section 716 also consequently relieves the waived entity from the recordkeeping and annual certification obligations of Section 717. See 47 U.S.C. § 618(a)(5).

<sup>490</sup> 47 U.S.C. § 617(h)(1) (granting the Commission the authority to waive the requirements of Section 716 "on its own motion or in response to a petition by a manufacturer or provider of advanced communications services or any interested party").

<sup>491</sup> AT&T Comments at 6; CEA Comments at 17.

<sup>492</sup> See CEA Comments at 19; CTIA Comments at 16-17; ESA Comments at 11; VON Coalition Comments at 6.

consumers may find for a product; but rather, an analysis of the facts available to the manufacturer or provider and their intent during the design phase. We may, for example, consider the manufacturer or provider's market research, the usage trends of similar equipment or services, and other information to determine whether a manufacturer or provider designed the equipment or service primarily for purposes other than ACS.

184. We note that equipment and services may have multiple primary, or co-primary purposes, and in such cases a waiver may be unwarranted.<sup>493</sup> Convergence results in multipurpose equipment and services that may be equally designed for multiple purposes, none of which are the exclusive primary use or design purpose. For instance, many smartphones appear to be designed for several purposes, including voice communications, text messaging, and e-mail, as well as web browsing, two-way video chat, digital photography, digital video recording, high-definition video output, access to applications, and mobile hotspot connectivity.<sup>494</sup> The CVAA would have little meaning if we were to consider waiving Section 716 with respect to the e-mail and text messaging features of a smartphone on the grounds that the phone was designed in part for voice communications.

185. We will also examine whether the equipment or service is marketed for the ACS features or functions. We agree with many commenters who suggest that how equipment or a service is marketed is relevant to determining the primary purpose for which it is designed.<sup>495</sup> We will examine how and to what extent the ACS functionality or feature is advertised, announced, or marketed and whether the ACS functionality or feature is suggested to consumers as a reason for purchasing, installing, downloading, or accessing the equipment or service.<sup>496</sup> We believe the best way to address the IT and Telecom RERCs' concern that a covered entity's assessment of how a product is marketed may be "subjective and potentially self-serving"<sup>497</sup> is to examine this factor on a case-by-case basis and to solicit public comment on waiver requests, as discussed below.

186. Several commenters suggest additional factors that we should consider when examining the primary purpose for which equipment or service is designed. While some of these factors may be valuable in some cases, we decline to incorporate these factors directly into our rules. However, these factors may help a petitioner illustrate the purpose for which its equipment or service is primarily designed. For instance ESA suggests we examine "[w]hether the ACS functionality intends to enhance another feature or purpose."<sup>498</sup> Microsoft similarly suggests we

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<sup>493</sup> But see TIA Sept. 28 *Ex Parte* at 2 (urging the Commission to consider "a device's or service's single primary purpose").

<sup>494</sup> See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133 (Terminated), Fifteenth Report, FCC 11-103, ¶¶ 138-144 (rel. June 27, 2011); *Accessibility NPRM*, 26 FCC Rcd at 3140-42, ¶ 15. See also Words+ and Compusult Comments at 7.

<sup>495</sup> AT&T Comments at 7; CEA Comments at 19-20; ESA Comments at 8; Microsoft Comments at 7; NetCoalition Comments at 6; TechAmerica Comments at 5. See also TIA Sept. 28 *Ex Parte* at 2. But see IT and Telecom RERCs Comments at 17; IT and Telecom RERCs Reply Comments at 2-3.

<sup>496</sup> As ESA explains, "a marketing campaign for a new product or service is likely to focus upon the most significant or attractive aspects of an offering's design." ESA Comments at 9.

<sup>497</sup> IT and Telecom RERCs Reply Comments at 3.

<sup>498</sup> ESA Comments at 8.

examine “[w]hether the offering is designed for a ‘specific class of users who are using the ACS features in support of another task’ or as the primary task.”<sup>499</sup> Whether the ACS functionality is designed to be operable outside of other functions, or rather aides other functions, may support a determination that the equipment or service was or was not designed primarily for purposes other than ACS. Similarly, an examination of the impact of the removal of the ACS feature or function on a primary purpose for which the equipment or service is claimed to be designed may be relevant to a demonstration of the primary purpose for which the equipment or service is designed.<sup>500</sup> Further, ESA suggests we examine “[w]hether there are similar offerings that already have been deemed eligible for a . . . waiver.”<sup>501</sup> An examination of waivers for similar products or services, while not dispositive for a similar product or service, may be relevant to whether a waiver should be granted for a subsequent similar product or service. These and other factors may be relevant for a waiver petitioner, as determined on a case-by-case basis.

187. Conversely, we believe there is little value in examining other suggested factors on the record. We do not believe that the “processing power or bandwidth used to deliver ACS vis-à-vis other features”<sup>502</sup> is relevant. No evidence provided supports the notion that there is a direct relationship between the primary purpose for which equipment or service is designed and the processing power or bandwidth allocated to that purpose. For example, text messaging on a wireless handset likely consumes less bandwidth than voice telephony, but both could be co-primary purposes of a wireless handset. Further, we do not believe that an examination of whether equipment or service “provides a meaningful substitute for more traditional communications devices” adds significantly to the waiver analysis.<sup>503</sup> The waiver analysis requires an examination of whether the equipment or service is designed primarily for purposes other than using ACS. The inquiry therefore is about the design of the multipurpose service or equipment, not the nature of the ACS component.<sup>504</sup>

188. In addition to the above factors we build into our rules and others that petitioners may demonstrate, we intend to utilize our general waiver standard, which requires good cause to waive the rules, and a showing that particular facts make compliance inconsistent with the public

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<sup>499</sup> Microsoft Comments at 7 (citing *Accessibility NPRM*, 26 FCC Red at 3154, ¶ 55). ESA originally suggested a similar formulation of this factor in its comments in response to the *October Public Notice*. ESA Comments to *October Public Notice* at 8-9.

<sup>500</sup> See IT and Telecom RERCs Comments at 17.

<sup>501</sup> ESA Comments at 8.

<sup>502</sup> ESA Comments at 8.

<sup>503</sup> Microsoft Comments at 7.

<sup>504</sup> We also disagree with the IT and Telecom RERCs’ suggestion that “[w]aivers should not be provided to an intentional communication function built into a larger non-communication product, but only to non-communication functions that could incidentally be used to communicate.” IT and Telecom RERCs Comments at 18. Section 716 requires that the equipment or service for which a waiver is sought must be capable of accessing ACS. 47 U.S.C. § 617(h)(1)(A). A key requirement of any ACS is the ability to communicate. Therefore, to even be eligible for a waiver, the equipment or service must include a communication function. See AT&T Comments at 4. Finally, we disagree with AFB’s argument that we must affirmatively find that “the ACS functionality can only be used when the other product features alleged by the petitioner to be the product’s primary functions are being engaged by the user.” AFB Reply Comments at 10. While the relationship between the ACS feature or function and the claimed primary purpose of equipment or service is designed is relevant, it is not necessarily dispositive.

interest.<sup>505</sup> CEA agrees with this approach.<sup>506</sup> The CVAA grants the Commission authority to waive the requirements of Section 716 in its discretion,<sup>507</sup> and we intend to exercise that discretion consistent with the general waiver requirements under our rules.<sup>508</sup>

189. We decline to adopt the waiver analysis proffered by AFB and supported by ACB.<sup>509</sup> AFB urges us to use the four achievability factors to examine waiver petitions.<sup>510</sup> We find that the achievability factors are inappropriate to consider in the context of a waiver. A waiver relieves an entity of the obligations under Section 716, including the obligation to conduct an achievability analysis.<sup>511</sup> It would be counter to the purpose of a waiver to condition its grant on an entity's ability to meet the obligations for which it seeks a waiver. As discussed above, our waiver analysis will examine the primary purpose or purposes for which the equipment or service is designed, consistent with the statutory language.<sup>512</sup>

190. The factors we establish here will promote regulatory certainty and predictability for providers of ACS, manufacturers of ACS equipment, and consumers. We intend for these factors to provide clear and objective guidance to those who may seek a waiver and those potentially affected by a waiver. Providers of ACS and ACS equipment manufacturers have the flexibility to seek waivers for services and equipment they believe meet the waiver requirements. While a provider or manufacturer will expend some level of resources to seek a waiver, the provider or manufacturer subsequently will have certainty regarding its obligations under the Act whether or not a waiver is granted.<sup>513</sup> If a waiver is warranted, the provider or manufacturer can

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<sup>505</sup> 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

<sup>506</sup> CEA Comments at 20 n.70 (“[T]he Commission should make clear that the waiver provision in the CVAA complements, and does not supplant or replace, the Commission’s general waiver and forbearance authority under the Act.”). CEA also included a public interest analysis in its waiver request filed on the record in this proceeding. See Letter from Julie M. Kearny, Vice President, Regulatory Affairs, Consumer Electronics Association to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 8-10 (filed July 19, 2011) (“CEA July 19 *Ex Parte*”). Further, in its reply comments, ESA included a public interest analysis in its waiver request for “video game offerings.” ESA Reply Comments at 16-20.

<sup>507</sup> 47 U.S.C. § 617(h)(1); House Report at 26; Senate Report at 8.

<sup>508</sup> CTIA believes that a discretionary process for waivers – specifically the process proposed in the *Accessibility NPRM* – is contrary to “Congress’s intent that the accessibility requirements not compromise industry innovation and progress.” CTIA Comments at 19. In CTIA’s view, the Commission is required to incorporate the statutory waiver language into its definition of ACS. See CTIA Comments at 19. Section 716(h)(1) plainly grants us the authority to waive the requirements of the Act, but does not direct us to do so. See 47 U.S.C. 617(h)(1). Furthermore, use of the term “waive” in the statute and the reference to the possibility of exercising that authority in response to petitions, clearly demonstrates that Congress intended a waiver process. See House Report at 26; Senate Report at 8.

<sup>509</sup> See AFB Reply Comments at 9-11; ACB Reply Comments at 23.

<sup>510</sup> AFB Reply Comments at 9.

<sup>511</sup> See 47 U.S.C. § 617(h)(1) (granting the Commission the authority to “waive the requirements of Section 716”).

<sup>512</sup> See discussion *supra* para. 181.

<sup>513</sup> A manufacturer or provider that receives a waiver will avoid the cost of compliance. A manufacturer or provider that is not granted a waiver can determine its obligations under the Act following an achievability analysis. The opportunity cost to seek a waiver is low since the alternative is compliance with the Act.

then efficiently allocate resources to other uses.

191. We encourage equipment manufacturers and service providers to petition for waivers during the design phase of the product lifecycle,<sup>514</sup> but we decline to adopt the proposal proffered by AFB to require petitioners to seek a waiver prior to product introduction.<sup>515</sup> The design phase is the ideal time to seek a waiver, but we will not foreclose the ability of a manufacturer or provider to seek a waiver after product introduction. AFB correctly observes: “If inaccessible equipment or services are first deployed in the marketplace, and the subsequently-filed waiver petition is not granted, the company would remain at tremendous risk of being found in violation of the CVAA’s access requirements and exposed to potential penalties.”<sup>516</sup> This reality should encourage equipment and service providers to seek waivers during the design phase without necessitating a mandate.

192. The Commission will entertain waivers for equipment and services individually or as a class. With respect to any waiver, the Commission may decide to limit the time of its coverage, with or without a provision for renewal.<sup>517</sup> Individual waiver requests must be specific to an individual product or service offering.<sup>518</sup> New or different products, including substantial upgrades that change the nature of the product or service, require new waivers.<sup>519</sup> Individual

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<sup>514</sup> See ESA Comments at 2 (“To be practical . . . a manufacturer or provider must know its accessibility obligations before making a product or service available, and thus prior to any consumer use.”); CTIA Comments at 18 (“[A]ccessibility must be considered early in the design process.”).

<sup>515</sup> AFB Reply Comments at 10.

<sup>516</sup> AFB Reply Comments at 10.

<sup>517</sup> Commenters disagree on the appropriate length of waivers and whether waivers should be renewed. For example, the IT and Telecom RERCs, Consumer Groups, AAPD, Green, and ACB suggest that no waiver should be permanent. Consumer Groups Comments at 13; IT and Telecom RERCs Comments at 19; AAPD Reply Comments at 5; ACB Reply Comments at 23; Green Reply Comments at 12-13. Green, ACB, and the IT and Telecom RERCs suggest waivers should last a maximum of 12 months. ACB Reply Comments at 23; Green Reply Comments at 13; IT and Telecom RERCs Comments at 19. Consumer Groups believe two years is sufficient. Consumer Groups Comments at 13. CEA argues for permanent waivers because limitations on the life of a waiver are not in the statute, and “permanent waivers . . . help reduce the burden on industry by eliminating the need to renew waivers.” CEA Comments at 18. VON Coalition argues that “[a]s long as ACS continues to be an ancillary function of the product – and the manufacturer or service provider is not designing or marketing the product based on its ACS features – the waiver should remain.” VON Coalition Comments at 7. Verizon suggests all waivers should last a minimum of 18 months. Verizon Comments at 9. TIA and TechAmerica assert that there should be no arbitrary time limits on waivers and that waivers should remain in effect as long as the conditions under which they were granted are met. TechAmerica Comments at 5; TIA Comments at 14-15. Green urges that we not automatically renew waivers. Green Reply Comments at 13. Given the speed at which communications technologies are evolving and the wide scope of devices and services covered by Section 716, it makes little sense for the Commission to establish a single length of time that would apply to all waivers. Rather, the Commission will determine the appropriateness of time-limited waivers on a case-by-case basis.

<sup>518</sup> This does not preclude combining multiple specific products with common attributes in the same waiver request.

<sup>519</sup> For example, a petitioner that manufactures many similar types of products – similar products of varying design, or similarly designed products with different product numbers – the petitioner must seek a waiver for each discrete product individually. This is analogous to rules implementing Section 255, which require entities to consider “whether it is readily achievable to install any accessibility features in a specific (continued....)

waiver petitioners must explain the anticipated lifecycle for the product or service for which the petitioner seeks a waiver. Individual waivers will ordinarily be granted for the life of the product or service.<sup>520</sup> However, the Commission retains the authority to limit the waiver for a shorter duration if the record suggests the waiver should be so limited.

193. We will exercise our authority to grant class waivers in instances in which classes are carefully defined and when doing so would promote greater predictability and certainty for all stakeholders.<sup>521</sup> For the purpose of these rules, a class waiver is one that applies to more than one piece of equipment or more than one service where the equipment or services share common defining characteristics. For the Commission to grant a class waiver, we will examine whether petitioners have defined with specificity the class of common equipment or services with common advanced communications features and functions for which they seek a waiver, including whether petitioners have demonstrated the similarity of the equipment or service in the class and the similarity of the ACS features or functions.<sup>522</sup>

194. In addition, we will examine whether petitioners have explained in detail the expected lifecycle for the equipment or services that are part of the class. Thus, the definition of the class should include the product lifecycle. All products and services covered by a class waiver that are introduced into the market while the waiver is in effect will ordinarily be subject to the waiver for the duration of the life of those particular products and services.<sup>523</sup> For products and services already under development at the time when a class waiver expires, the achievability analysis conducted at that time may take into consideration the developmental stage of the product and the effort and expense needed to achieve accessibility at that point in the developmental stage.

195. To the extent a class waiver petitioner seeks a waiver for multiple generations of similar equipment and services, we will examine the justification for the waiver extending through the lifecycle of each discrete generation. For example, if a petitioner seeks a waiver for a class of devices with an ACS feature and a two-year product lifecycle, and the petitioner wishes to cover multiple generations of the product, we will examine the explanation for why each generation should be included in the class. If granted, the definition of the class will then include the multiple generations of the covered products or services in the class.

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product whenever a natural opportunity to review the design of a service or product arises.” *Section 255 Report and Order*, 16 FCC Rcd at 6447, ¶ 71.

<sup>520</sup> See TechAmerica Comments at 5; TIA Comments at 14-15; VON Coalition Comments at 7.

<sup>521</sup> 47 U.S.C. § 617(h)(1) (granting the Commission the authority to waive the requirements of Section 716 for classes of equipment and services).

<sup>522</sup> We distinguish class waivers from categorical waivers. Several commenters urge us to adopt rules that waive the requirements of Section 716 for whole categories of equipment or services. See TechAmerica Comments at 5; TIA Comments at 13; Verizon Comments at 9; CTIA Reply Comments at 18-19. We decline to adopt waivers for broad categories of equipment or services because we believe that the facts specific to each product or product type within a category may differ such that the ACS feature or function may be a primary purpose for which equipment or service within the category is primarily designed. We will utilize a fact-specific, case-by-case determination of all waiver requests. See discussion *supra* para. 181.

<sup>523</sup> As with ordinarily granting individual waiver requests for the life of the product or service, the Commission retains the authority to limit a class waiver for a shorter duration if the record suggests the waiver should be so limited. See discussion *supra* para 192.

196. While many commenters agree that we should consider class waivers,<sup>524</sup> we note that others are concerned that class waivers might lead to a “class of inaccessible products and services”<sup>525</sup> well beyond the time that a waiver should be applicable.<sup>526</sup> We believe this concern is addressed through our fact-specific, case-by-case analysis of waiver petitions and the specific duration for which we will grant each class waiver.

197. Several commenters urge us to adopt a time period within which the Commission must automatically grant waiver petitions if it has not taken action on them.<sup>527</sup> We decline to do so. As the Commission noted in the *Accessibility NPRM*,<sup>528</sup> in contrast to other statutory schemes,<sup>529</sup> the CVAA does not specifically contemplate a “deemed granted” process. Nonetheless, we recognize the importance of expeditious consideration of waiver petitions to avoid delaying the development and release of products and services.<sup>530</sup> We hereby delegate to the Consumer and Governmental Affairs Bureau (“Bureau”) the authority to decide all waiver requests filed pursuant to Section 716(h)(1) and direct the Bureau to take all steps necessary to do so efficiently and effectively. Recognizing the need to provide certainty to all stakeholders with respect to waivers, we urge the Bureau to act promptly to place waiver requests on Public Notice and to give waiver requests full consideration and resolve them without delay. The Commission also hereby adopts, similar to its timeline for consideration of applications for transfers or assignments of licenses or authorizations relating to complex mergers, a timeline for consideration of applications for waiver of the rules we adopt today. This timeline represents the Commission’s goal to complete action on such waiver applications within 180 days of public notice. This 180-day timeline for action is especially important in this context, given the need to provide certainty to both the innovators investing risk capital to develop new products and services, as well as to the stakeholders with an interest in this area. Therefore, it is the Commission’s policy to decide all such waiver applications as expeditiously as possible, and the Commission will endeavor to meet its 180-day goal in all cases. Finally, although delay is unlikely, we note that delay beyond the 180-day period in a particular case would not be indicative of how the Commission would resolve an application for waiver.

198. We emphasize that a critical part of this process is to ensure a sufficient opportunity for public input on all waiver requests.<sup>531</sup> Accordingly, our rules provide that all waiver requests must be put on public notice, with a minimum of a 30-day period for comments and oppositions. In addition, public notices seeking comment on waiver requests will be posted on a webpage designated for disability-related waivers and exemptions in the Disability Rights Office section of the Commission’s website, where the public can also access the accessibility

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<sup>524</sup> See AT&T Comments at 5-7; CEA Comments at 17-18; ESA Comments at 13-15; Microsoft Comments at 7; NetCoalition Comments at 7; VON Coalition Comments at 7.

<sup>525</sup> Words+ and Compusult Comments at 20.

<sup>526</sup> See IT and Telecom RERCs Comments at 19-20.

<sup>527</sup> See AT&T Comments at 8; CTIA Comments at 18; ESA Comments at 16; TIA Comments at 14.

<sup>528</sup> *Accessibility NPRM*, 26 FCC Rcd at 3155, ¶ 57.

<sup>529</sup> See, e.g., 47 U.S.C. § 160(c) (providing that any petition for forbearance shall be “deemed granted” if the Commission does not deny the petition).

<sup>530</sup> See CTIA Comments at 18; ESA Comments at 15-17; TIA Comments at 14.

<sup>531</sup> See IT and Telecom RERCs Comments at 19; TechAmerica Comments at 5; ACB Reply Comments at 23.